Supreme Court, U. S.
F I L E D
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No. 97-484

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

REGINALD CLEMONS,

Petitioner,

vs.

STATE OF MISSOURI

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner, Reginald Clemons, was convicted of murder in the first degree, §565.020, RSMo 1994, for which he was sentenced to death. Petitioner filed a direct appeal. Petitioner then filed a motion to vacate, set aside, or correct the judgment or sentence of the trial court pursuant to Missouri Supreme Court Rule 29.15. Petitioner's Rule 29.15 motion was consolidated with his direct appeal. The facts relating to petitioner's offense are summarized in the opinion of the Missouri Supreme Court affirming petitioner's conviction, sentence, and the denial of post-conviction relief. State v. Clemons, 946 S.W.2d 206 (Mo. banc 1997). Respondent does not dispute that petitioner's claims were presented to the Missouri Supreme Court.

ARGUMENT

I. Petitioner Did Not Unequivocally Invoke His Fifth Amendment Right To Remain Silent And, In Fact, He Made It Clear That He Wanted To Waive His Miranda Rights.

In his petition for a writ of certiorari, petitioner appears to claim that the trial court erred when it admitted into evidence his audiotaped statement to the police, because the police did not honor his constitutional rights after he allegedly unequivocally asserted his constitutional rights (Petition at 11-13).

The record shows that at a little after 6:00 p.m., on April 7, 1991, Officers Walsh and Brauer went to a location on Barken Avenue in Northwoods and spoke to petitioner (Tr. 2192-2196; 2840-2844). The officers identified themselves and asked if petitioner would accompany them to police headquarters, because his name had surfaced in "the bridge case" (Tr. 2194, 2846). Petitioner agreed (Tr. 2194, 2846). He got into the officers' car and accompanied them to police headquarters (Tr. 2194-2195, 2846). They arrived at the interview room at about 6:30 p.m. (Tr. 2197, 2846). Petitioner was not under arrest (Tr. 2848). He was not handcuffed, and he was free to leave (Tr. 2195, 2846).

Before being interviewed by Officers Pappas and Brauer, petitioner was advised of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (Tr. 1313, 1320, 2397-2398, 2847-2848). Petitioner indicated that he understood his rights and he said, "I don't want a lawyer, I'll talk to you guys" (Tr. 2398, 2848). Petitioner was interviewed for about forty-five minutes, took a twenty minute break, and then was interviewed from about 7:50 to 9:05 p.m. (Tr. 2399, 2404, 2859). Before and during the

making of this statement, petitioner was not beaten, threatened, coerced, and he did not ask for an attorney (Tr. 1303, 1316, 1327-1328, 1370, 2848, 2858, 2862-2863, 2879-2882, 2932).

Petitioner agreed to make an audiotaped statement, was again informed of his Miranda rights, and he made a misstatement about whether he wanted to waive them (Tr. 2397-2406, 2847-2848, 2862-2863; State's Exhibits 136-137). He quickly clarified what he meant and indicated that he desired to waive his Miranda rights again and make a statement (State's Exhibits 136-137). Specifically, the record shows that the following occurred when petitioner was asked about waiving his rights during the audiotaped statement:

> Q: Okay. At this time, Reginald, -- uh -- do you wish to waive these constitutional rights and make a statement concerning what happened on the night of April 5th, 1991, on this -- on the Chain of Rocks Bridge?
>
> A: No, sir.
>
> Q: Okay, you do -- you don't want to make a statement at this time?
>
> A: I don't want to use the rights.
>
> Q: In other words your -- okay -- in other words, you're waiving your rights to make statement. Is that -- is that right?
>
> A: Yes.
>
> Q: Okay. So you're waiving your constitutional rights?

A: Okay, sir.

DET. BRAUER: That means you give up the right -- what it means is that you give up those rights and that you want to talk about the incident. Is that what you want to do? Tell us about the incident?

A: Yes, sir.

DET. BRAUER: Okay. That's what we mean. That's what it means to waive your rights.

DET. PAPPAS: All that means is that you want to waive these rights at this time to make a -- an audio taped statement. That's what we're talking about. Okay. Do you still understand what we're saying? I don't want you to be confused about this.

A: Yes. I want to tell everything that happened up on the bridge.

Q: Okay. So you're wishing to make a statement?

A: Yes.

(State's Exhibits 136, 137 p. 3-4).

It is clear that if an individual unequivocally indicates that he wishes to remain silent, "interrogation" must cease. Miranda v. Arizona, supra 384 U.S. at 474. However, if an individual is indecisive, there may be some question on whether he waived or did not waive his rights. Id. at 485;

State v. Smith, 588 S.W.2d 27, 30 (Mo.App., E.D. 1979). The surrounding circumstances should be considered. See State v. Reese, 795 S.W.2d 69, 71-72, 76-82 (Mo. banc 1990), cert. denied 499 U.S. 1110 (1991). For example, "When a suspect who has been informed of his rights expresses both a desire for counsel and a desire to continue the interview without counsel, it is permissible for the questioning official to make further inquiry to clarify the suspect's wishes." State v. Lewis, 645 P.2d 722, 726 (Wash. App. 1982); see also Hall v. State, 336 S.E.2d 812, 816 (Ga. 1995).

An all-important distinction must here be drawn between on the one hand, "an inquiry for the limited purpose of clarifying whether the defendant is invoking his right to remain silent" and, on the other hand, "questioning aimed at eliciting incriminating statements concerning the very subject on which the defendant has invoked his right." State v. Ladd, 431 A.2d 60, 63 (Me. 1981).

As can be seen from the above-quoted portion of the record, petitioner did not intend to invoke his Fifth Amendment rights; he simply misspoke. Officer Pappas recognized that petitioner misunderstood the question, in light of the fact that petitioner had just stated that he wanted to make another statement, and Officer Pappas merely got petitioner to elarify his response. Officer Pappas' question was "calculated innocently to clarify defendant's statement, rather than improperly 'to persuade (defendant) to reconsider his position,' Michigan v. Mosley, [96 U.S. 321, 104, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975)], or otherwise to infringe upon his right to silence." State v. Ladd, supra at 63. Nor was it "badgering," see Oregon v. Bradshaw, 462 U.S. 1039, 1044, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), which was intended to be prevented by the prophylactic rules created by this Court. It was simply a permissible request for clarification.

The Missouri Supreme Court properly stated:

> Unlike appellant, we do not read Miranda searching for out-of-context sentences that support a preferred outcome. Honestly read, Miranda contemplates situations in which there may be some question as to whether a defendant wishes to assert his rights or not. In such instances, the interviewer may clarify the defendant's intent by continued questioning as to whether or not the defendant does or does not waive his rights. Miranda v. Arizona, 384 U.S. 436, 485, 86 S.Ct. 1602, 1633-1634, 16 L.Ed.2d 694 (citing with approval Federal Bureau of Investigation procedures for conduct of custodial interviews with respect to subject's constitutional rights).
>
> In light of the fact that appellant had been freely speaking with the police for the past two hours, had already confessed, and had agreed to make a tape-recorded statement before the detectives began to record the confession, we find that appellant's response was not an unequivocal assertion of his rights but rather an ambiguous, equivocal statement of his intent that required clarification. The detectives did not violate appellant's constitutional rights by asking questions to clarify his intentions. His intentions, as reflected by the entire conversation, were to waive his rights and make a statement.
>
> The trial court did not abuse its discretion in failing to suppress the taped confession.

State v. Clemons, 946 S.W.2d 206, 219 (Mo. banc 1997).

Moreover, petitioner was not prejudiced by the admission of this evidence. It was consistent with the testimony about his non-audiotaped confession. If petitioner took the stand and denied that he confessed, the audiotaped confession would have been admissible, regardless of whether petitioner's Fifth Amendment rights were violated, in order to prevent petitioner from committing perjury. Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971); State v. Engel, 859 S.W.2d 822 829-830 (Mo.App., W.D. 1993). Thus, petitioner's first claim does not warrant review by this Court.

II. Venireperson Doss Was Not Qualified To Serve On The Jury

In petitioner's second claim, he appears to allege that this Court should grant a writ of certiorari, because the trial court abused its discretion when it struck venireperson Doss for cause on the ground that it did not believe that Doss could consider the full range of punishment (Petition at 17).

The record shows that Doss initially said that he could not vote for the death penalty, because of long-held religious beliefs (Tr. 808-809). He then said that he could consider the death penalty, unless petitioner was not the person who threw the ladies off of the bridge (Tr. 811). Doss then did an about-face again and said that he could vote for the death penalty even if petitioner did not throw the girls off the bridge (Tr. 811). He later said that he could consider the death penalty in the acting with another context, but he did not say whether he could consider it if petitioner was the accomplice that did not throw the victims off of the bridge (Tr. 866). The trial court struck Doss, because it did not believe that Doss had been adequately rehabilitated with respect to acting with another (Tr. 900). Petitioner did not challenge this finding (Tr. 900). In light of the inconsistent answers given by Doss, the trial court was not compelled to accept Doss' assessment of his own capabilities.

The Missouri Supreme Court properly found the following:

> While a trial court cannot exclude a juror from a capital punishment case simply because of a conscientious objection to the death penalty, a juror may be excluded if his views would "prevent or substantially impair the performance of his duties as a juror in

> accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985). The trial court has broad discretion in determining whether a prospective juror is "death qualified," as the trial judge is to a superior position to evaluate the demeanor and testimony of the prospective jurors. State v. McMillin, 783 S.W.2d 82, 93 (Mo. 1990)[cert. denied 111 S.Ct. 225 (1990)].
>
> Doss's equivocal and shifting responses to questions focusing on his ability to impose the death penalty provide a sufficient rationale for the trial court's decision to sustain the state's motion. In light of Doss's conflicting testimony, the trial court did abuse its discretion in striking Doss for cause.

State v. Clemons, supra at 225.

As this Court recognized in Wainwright v. Witt, supra 469 U.S. at 424-425, "many venirepersons simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing a death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." The trial court's determination of the venireman's state of mind is a finding based upon demeanor and credibility that are peculiarly within the trial judges province. Id. 469 U.S. at 429.

The trial court acted within its discretion, when

confronted with conflicting answers from venireperson Doss, by determining that some of venireperson Doss' answers concerning his ability to impose the death penalty were not credible, that Doss' answers concerning his inability to impose the death penalty were credible, and that Doss was not qualified to sit as a juror in a death-penalty case. State v. Kinder, 942 S.W.2d 313, 324-325 (Mo. banc 1996).

This case presents no issue worthy of this Court's review. It was properly decided based on well-settled precedent from this Court.

III. No Improper Duplication Of Statutory Aggravating Circumstances Occurred

Petitioner appears to claim that the trial court erred by submitting two statutory aggravating circumstances to the jury, because those circumstances are allegedly improperly duplicative and Missouri is allegedly a weighing state (Petition at 24-27). However, as will be demonstrated below, both of these claims are false.

Petitioner claims that the statutory aggravating circumstance -- whether the defendant committed the murders of Robin and Julie Kerry while the defendant was knowingly aiding or encouraging Marlin Gray and Antonio Richardson in the perpetration or attempt to perpetrate robbery, §565.032.2(11), RSMo 1994, was improperly duplicative of the statutory aggravating circumstance -- whether the defendant murdered Robin and Julie Kerry for the purpose of the defendant and Marlin Gray and Antonio Richardson receiving money or any other thing of monetary value from Thomas Cummins, §565.032.2(4), RSMo 1994.

"Missouri is a 'non-weighing' state." Kilgore v. Bowersox, No. 96-2563EM, slip op. at 9 (8th Cir. September 8, 1997); Sidebottom v. Delo, 46 F.3d 744 (8th Cir. 1995), cert. denied 116 U.S. 144 (1995); LaRette v. Delo, 44 F.3d 681, 687 n. 4 (8th Cir. 1995), cert. denied 116 U.S. 246 (1995). As in the State of Georgia, from whence Missouri statutory scheme was taken, see State v. Mercer, 618 S.W.2d 1, 5 (Mo. banc 1981), cert. denied 454 U.S. 933 (1981), a statutory aggravating circumstance is a mere legal conclusion which, at the threshold, allows the sentencer to consider the possibility of a death sentence. State v. Shaw, 636 S.W.2d 667, 675 (Mo. banc 1982), cert. denied 459 U.S. 928 (1982); see Zant v. Stephens, 462 U.S. 862, 870-872, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Once this threshold is crossed, the

sentencer considers "all evidence" (emphasis in original) in identifying facts and circumstances which aggravate or mitigate punishment. State v. Shaw, supra at 675; State v. Brown, 902 S.W.2d 278, 296 (Mo. banc. 1994), cert. denied 116 S.Ct. 679 (1995); State v. LaRette, 648 S.W.2d 96, 102 (Mo. banc 1983), cert. denied 459 U.S. 1137 (1983); Zant v. Stephens, supra, 462 U.S. at 872-873.[1] The legal conclusion that an aggravating circumstance exists does not play any role in guiding the sentencing body in the exercise of its discretion, apart from narrowing the class of persons convicted who are eligible for the death penalty. Id. Under this sentencing scheme, there need be only one valid finding of a statutory aggravating circumstance, and a defendant is prejudiced in the determination of sentence only if error is made in the evidence that the sentencer is allowed to consider. Id., 462 U.S. at 873.

The Missouri Supreme Court properly recognized in the case at bar, that petitioner's claim that the jury was mislead by improper duplication was without merit. State v. Clemons, supra at 232. Since statutory aggravating

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[1]The description of the Georgia system in Zant v. Stephens, supra at 874 which follows is applicable to Missouri: "In Georgia, unlike some other states, the jury is not instructed to give any special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard." Moreover, in Missouri jurors are not required to make a written finding of any mitigating circumstances, and the jurors have discretion to impose a life sentence regardless of whether the aggravating evidence is outweighed by mitigating evidence. State v. Petary, 790 S.W.2d 243, 245-246 (Mo. banc 1990), cert. denied 498 U.S. 973 (1990).

circumstances merely open the door to consideration of capital punishment, at which point the jury considers all the evidence, petitioner's "duplication" theory is meaningless. State v. Ramsey, supra; State v. Brown, 902 S.W.2d 278, 293 (Mo. banc 1995), cert. denied 114 S.Ct. 1664 (1994). Even if duplication occurred, it would not be prejudicial. State v. Zeitvogel, 707 S.W.2d 365, 369-370 (Mo. banc 1986), cert. denied 479 U.S. 871 (1986).

Moreover, the statutory aggravating circumstances in question are not duplicative, because "they emphasize different facets of criminal activity." State v. Jones, 749 S.W.2d 356, 365 (Mo. banc 1988), cert. denied 488 U.S. 871 (1988); Kilgore v. Bowersox, supra at 9. The first one had to do with the defendant's greed, and the second one had to do with the use of force. State v. Jones, supra at 365; State v. Griffin, 756 S.W.2d 475, 489 (Mo. banc 1988), cert. denied 490 U.S. 1113 (1989); State v. Wise, 879 S.W.2d 494, 521 (Mo. banc 1994), cert. denied 115 S.Ct. 757 (1995); State v. Smulls, 935 S.W.2d 9, 23 (Mo. banc 1996), cert. denied 117 S.Ct. 2415 (1997). Thus, this case presents no issue that warrants review from this Court.

CONCLUSION

In view of the foregoing, respondent submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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